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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
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Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming	)	CS Docket No. 97-141
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COMMENTS OF BELLSOUTH CORPORATION, BELLSOUTH INTERACTIVE MEDIA SERVICES, INC. AND BELLSOUTH WIRELESS CABLE, INC.

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Directed to: The Commission

**COMMENTS OF BELLSOUTH CORPORATION,
BELLSOUTH INTERACTIVE MEDIA SERVICES, INC. AND
BELLSOUTH WIRELESS CABLE, INC.**

BellSouth Corporation and its subsidiaries BellSouth Interactive Media Services, Inc. and BellSouth Wireless Cable, Inc. (hereinafter referred to collectively as "BellSouth"), by their attorneys, hereby file their comments with respect to the FCC's *Notice of Inquiry* (the "*NOI*") in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY.

BellSouth urges the Commission to close loopholes in its program access rules and thereby ensure the full and fair competition to incumbent cable operators that Congress intended to promote in the 1992 Cable Act and the Telecommunications Act of 1996. Such competition cannot occur if changing market conditions render the Commission's existing rules obsolete. Yet that is exactly what will happen if the Commission does not take note of recent developments and act immediately.

The FCC's *Notice of Inquiry* has arrived in the wake of transactions that will produce unprecedented horizontal and vertical integration among the largest cable MSOs and create even closer alliances between non-vertically integrated cable programmers and the cable operators whose stranglehold on local distribution is absolutely critical to any programmer's success. By the same token, cable overbuilds and digital wireless cable service will soon create the first *bona fide* competition to cable in many markets throughout the United States. The confluence of increased cable industry consolidation and the introduction of more widespread multichannel video programming distributor ("MVPD") competition will render alternative MVPDs even more vulnerable to anticompetitive practices and, as a result, in greater need of vigorous FCC oversight in the program access arena.

Further, for the reasons set forth below, BellSouth urges the FCC to (1) adopt BellSouth's Petition for Reconsideration with respect to the FCC's antenna preemption rules and thereby minimize opportunities for local entities to adopt antenna restrictions that forestall competition from wireless MVPD providers; and (2) expeditiously resolve its cable inside wiring docket to provide all MVPDs some certainty as to the "rules of the road" in the MDU environment.

II. DISCUSSION.

A. The Accelerated Consolidation of the Cable Industry Will Require Aggressive Regulation of Anticompetitive Conduct by Incumbent Cable Operators.

In its previous annual report to Congress on the state of competition in the MVPD marketplace, the FCC concluded that "incumbent franchised cable systems continue to be the primary distributors of multichannel video programming . . .,"[1/] and all available evidence indicates that this will continue to be the case for the foreseeable future.[2/] It is also apparent that reports of the cable industry's demise have been greatly exaggerated: cash flows of the largest cable MSOs are expected to increase substantially this year, and recent cable transactions have strengthened investor confidence that cable will maintain its dominant position in the MVPD marketplace.[3/] Those very same transactions, however, suggest that the market conditions which prompted Congress to adopt the 1992 Cable Act are about to become substantially worse, and must be countered by aggressive FCC oversight of the cable industry's behavior towards its competitors.

1/ *In the Matter of* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 96-133, FCC 96-496, (rel. Jan. 2, 1997) *[the "Third Annual Report"]* ¶ 4.

2/ For instance, according to a recent report by Strategis Group, cable's subscriber base will grow to nearly 68 million by 2002, whereas wireless cable is projected to achieve a subscriber base of 3.7 million within that same time period. *Communications Daily*, at 7 (June 2, 1997).

3/ *See, e.g.,* Gibbons, "Cable's Week In The Sun," *Multichannel News*, at 1 (June 16, 1997); Neel, "Cable's Stock Rises on Wall Street," *Cable World*, at 1 (June 16, 1997); Palmieri and Aguayo, "Hold the Obituaries," *Forbes*, at 44 (Feb. 24, 1997).

At the heart of the problem is the unprecedented wave of consolidation between large cable MSOs in local markets over the past few weeks. Well prior to these events, the Commission observed:

> In all but a few local markets for the delivery of video programming the vast majority of consumers still subscribe to the service of a single incumbent cable operator. The resulting high level of concentration, together with impediments to entry and product differentiation, mean that the structural conditions of markets for the delivery of video programming are conducive to the exercise of market power by cable operators.[4/]

Indeed, by the end of 1995, the four largest MSOs served 61.4% of all cable subscribers nationwide - Tele-Communications, Inc. ("TCI") (27.9%), Time Warner (18.9%), Continental/U S WEST (7.7%) and Comcast (6.8%).[5/] Moreover, the cable industry has become highly concentrated at the regional level as well: the number of cable system "clusters" serving at least 100,000 subscribers increased from 97 at the end of 1994 to 137 by year-end 1995, accounting for 50% of all cable subscribers nationwide.[6/] Among the four largest MSOs, Time Warner and TCI each controlled 32 such clusters, and Comcast controlled six.[7/]

By the end of *this* year, however, consolidation within the cable industry will accelerate to unprecedented levels, in large part due to TCI's recently announced plan to enter into joint ventures

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4/ *Id.* at ¶ 128.

5/ *Third Annual Report* at ¶ 130.

6/ *Id.* at ¶ 137.

7/ *Id.*

with other large MSOs for the purpose of forming regional cable clusters in large markets across the United States.[8] For instance, TCI has agreed to sell 10 cable systems serving 820,000 subscribers in the New York ADI to Cablevision Systems Corp. ("Cablevision") in exchange for a one-third interest in that company.[9] Because Cablevision already owns systems serving 1.7 million subscribers in the New York market, its acquisition of the TCI systems will create a cluster of 2.5 million subscribers, the largest of its kind in the United States. More recently, TCI announced a joint venture with Falcon Holding Group, L.P., under which TCI will consolidate approximately 300,000 TCI subscribers in six states with 700,000 Falcon subscribers in 26 states.[10] Upon completion of the deal, it is expected that TCI will own approximately 40% of the combined company. In addition, TCI has entered into an agreement with Adelphia Communications Corp. to form a 466,000 subscriber cluster in Pennsylvania, New York and Ohio.[11]

Further, shortly after the announcement of the TCI/Cablevision transaction, Fox Sports Net, which is a 50/50 venture between TCI's Liberty Media Corp. and News Corp.'s Fox Sports,

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8/ Robichaux, "TCI Closing Deals with Time Warner, Others to Shed Subscribers, Slash Debt," *Wall Street Journal,* at B14 (June 24, 1987); Higgins, "TCI Cablevision Numbers Puzzle Wall Street," *Broadcasting*, at 54 (June 16, 1997).

9/ Umstead, "More Moves for TCI/Cablevision?", *Multichannel News*, at 1 (June 16, 1997).

10/ Gibbons & Hearn, "TCI Subs Fly to Falcon," *Multichannel News*, at 1 (June 30, 1997).

11/ Neel, "TCI Shuffles the Deck," *Cable World*, at 8 (June 16, 1997). TCI is also expected to announce similar transactions with Adelphia in Miami; with Comcast in Pennsylvania and New Jersey; with TCA Cable in Texas; and with InterMedia Partners in Kentucky. *Id.*

announced an agreement to purchase 40 percent of Cablevision's SportsChannel regional networks.[12] The eight owned-and-operated Fox/Liberty regional sports networks and the seven SportsChannel regional services will be merged to create a new national sports network that will reach 55 million cable subscribers in 17 major markets, second only to ESPN.[13] It has also been announced that cable-controlled DBS operator PrimeStar Partners will acquire the high-power DBS orbital slot and two satellites owned by American Sky Broadcasting, the DBS venture backed by News Corp. and MCI Communications.[14] Finally, Microsoft, which is 50% owner of the MSNBC programming service, is making a $1 billion investment in Comcast, which serves 4.3 million subscribers nationwide and holds ownership interests in Liberty and a variety of programming services.[15]

The potential anticompetitive effects of these transactions are brought into sharper focus when viewed in the context of ongoing efforts by BellSouth and others to provide consumers with alternative sources of multichannel video service. For its part, BellSouth has been pursuing an

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12/ Umstead, "Fox Builds Sports Empire," *Multichannel News*, at 1 (June 23, 1997).

13/ *Id.* The new venture will control the local cable rights to 20 Major League Baseball teams, 17 NBA teams and 12 NHL franchises. "New Teammates: Fox/Liberty Nets, SportsChannel," *Media Daily* (July 1, 1997).

14/ Breznick and Stump, "A DBS Powerhouse: News Corp., PrimeStar Finally Make it Official," *Cable World*, at 1 (June 16, 1997). In return, News Corp. will receive $1.1 billion worth of non-voting securities in PrimeStar. After completion of the transaction, TCI and Time Warner will each receive a 26% to 28% stake in PrimeStar; the other remaining partners, which include cable MSOs U S WEST Media Group, Comcast and Cox Communications, will split the remaining 16% to 18%. "PrimeStar-News Corp. Merger Seems on Track," *Media Daily* (June 9, 1997).

15/ Ellis, "What Microsoft Wants with Comcast Corp.," *Multichannel News*, at 1 (June 16, 1997). Comcast-owned programming services include QVC, The Golf Channel, Viewer's Choice, Outdoor Life, Speedvision and the Sunshine Network.

aggressive strategy of deploying wired and wireless multichannel video technologies throughout its telephone service area in direct competition with incumbent cable operators. As of the date of this writing, BellSouth has obtained cable franchises in 17 communities in Alabama, Florida, Georgia, South Carolina and Tennessee, representing a total of almost 1.2 million cable households.[16/] The FCC has recognized that the competition provided by BellSouth's cable overbuild in Chamblee and DeKalb County, Georgia has already yielded substantial benefits to cable subscribers in that community,[17/] and BellSouth expects to achieve similar results elsewhere as it rolls out competitive cable service in its other franchise areas.

BellSouth also has made a substantial commitment to provide digital wireless cable service in major markets throughout the southeastern United States. Specifically, BellSouth has entered into or completed agreements to acquire MDS and ITFS channel rights covering 4.5 million homes in and around several large markets in Florida, and in Atlanta, New Orleans and Louisville. BellSouth is scheduled to launch digital wireless cable service in New Orleans and Atlanta during the fourth quarter of 1997, in Jacksonville and Orlando during the first half of 1998 and in Miami/Ft. Lauderdale and Louisville during the second half of 1998.[18/]

16/ *See also,* "Cable Should Not Lose Sight of Telco Threat," *Video Technology News* (June 2, 1997).

17/ *Third Annual Report* at ¶¶ 213-217.

18/ *See, e.g.*, Gibbons, "PCTV's Story: Waiting for Digital," *Multichannel News*, at 54 (Dec. 9, 1996); Barthold, "A Foggy Road Ahead," *Cable World*, at 21 (Jan. 27, 1997); Barthold, "Going Digital," *Cable World*, at 22 (Jan. 27, 1997); Breznick, "BellSouth Eyes Atlanta, New Orleans, Miami for '98 MMDS Launches," *Cable World*, at 12 (Dec. 2, 1996); Estrella, "Is L.A. the MMDS Industry's Last Stand?", *Multichannel News*, at 39 (June 23, 1997).

BellSouth wishes to emphasize that while it is highly optimistic about its prospects for providing *bona fide* competition to the cable industry, such competition will not be self-effectuating. To the contrary, BellSouth's efforts have required an enormous commitment of resources and will yield substantial benefits to the consumer only if the regulatory environment promotes market entry. In this regard, it must be remembered that the price of entry into the multichannel video distribution marketplace includes significant investments or "sunk costs" that cannot be redeployed to another use if their initial use proves unprofitable.[19] BellSouth's experience with wireless cable is a case in point: to date the company has invested or committed to invest in excess of $100 million to acquire the channel rights necessary to provide a competitive, digital wireless cable service in New Orleans, Atlanta and Miami. This figure does not include the substantial fees BellSouth has committed to pay ITFS licensees in exchange for the right to lease excess capacity on ITFS channels, nor does it include the sums BellSouth has paid or will pay for the transmission and reception equipment necessary to develop digital wireless cable systems and distance learning infrastructures for local ITFS licensees.

Furthermore, BellSouth's wired and wireless cable systems will compete against very large MSOs that are poised to offer digital video services over their cable plant. In Miami, for example, BellSouth's wireless cable system will compete directly with the cable television system owned by the nation's largest MSO, Tele-Communications, Inc. ("TCI"), which recently rolled

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[19] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 96-133, FCC 96-496 at ¶ 127 (rel. January 2, 1997) [the "*1996 Competition Report*"].

out digital cable service in several markets and intends to do so in a total of 40 markets passing five million homes by the end of 1997.[20] The cable industry is also making substantial inroads into Internet access and other two-way services that will further strengthen its already dominant position within the MVPD marketplace.[21]

In addition, BellSouth and other cable overbuilders must overcome cable industry opposition at the local level which is designed solely to delay the introduction of competition. As BellSouth has previously reported to the FCC, these anticompetitive efforts have taken the form of "level playing field" statutes which incumbent cable operators have pushed through their state legislatures and subsequently used as a pretext to block the issuance of competitive franchises.[22] The effect of "level playing field" statutes on competition is by no means speculative: in Dade County, Florida, no fewer than five cable MSOs have joined forces in an attempt to enjoin the local franchising authority from issuing a franchise to BellSouth.[23] In addition, an Illinois court recently allowed Jones Intercable to go forward with a similar lawsuit against Ameritech New Media under that state's level playing field

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[20] Mitchell, "TCI's Digital Express," *Cable World*, at 1 (February 10, 1997).

[21] *See, e.g.*, Ellis, "Microsoft Pushing Operating System to MSOs for Set-Tops," *Multichannel News*, at 51 (June 30, 1997).

[22] *See* Comments of BellSouth Telecommunications, Inc., CS Docket No. 95-61, at 4-5 (filed June 30, 1995), *quoting* Hazlett, "Predation in Local Cable TV Markets," (May 31, 1995) unpublished manuscript used with permission of author, at 23-24 (footnotes omitted).

[23] *Rifkin/Miami Management et al. v. Metropolitan Dade County*, 97-1567 (S.D. Fla., filed May 15, 1995) and *ACP Holding Corp. V. Metropolitan Dade County*, 97-10915 (Dade County, Fla, Cir. Ct., filed May 15, 1997).

statute, leaving open the possibility that the local franchising authority in that case may be enjoined from issuing a franchise to Ameritech for the indefinite future.[24/]

In sum, providers of multichannel video service, and thus the FCC, are approaching a new era. The confluence of joint ventures between the largest cable MSOs and video programmers, combined with the launch of competitive cable and wireless cable service for the first time in large markets throughout the United States, will inevitably require the FCC to reexamine whether its current regulatory framework is sufficient to lower the already substantial barriers to market entry for cable's competitors. Clearly, the FCC's rules governing cable industry behavior, while effective to some extent, were designed for a different market environment. BellSouth thus urges the FCC to adopt a proactive regulatory approach that incorporates BellSouth's specific recommendations set forth below.

B. The FCC Should Intensify Its Regulatory Efforts To Address Marketplace Conditions Which Most Directly Constrain A New Market Entrant's Ability To Compete With Incumbent Cable Operators.

1. The FCC Should Act Immediately to Close Loopholes in its Program Access Rules.

Significantly, Congress has already taken note of the above-described developments and is on the verge of considering legislation to eliminate their adverse effects on program access.[25/]

[24/] *Cable TV Fund 14-A, Ltd., d/b/a Jones Intercable v. City of Naperville, et al.*, 96-C-5962 (N.D.Ill., May 21, 1997).

[25/] Rep. Billy Tauzin, the chairman of the House Telecommunications Subcommittee and the principal author of the program access provisions of the 1992 Cable Act, recently indicated that he may introduce a bill that would deny all programmers the right to sell their products

BellSouth submits that to preserve competition and thus promote the public interest, the FCC should follow Congress's lead and close loopholes in its program access rules which allow cable programmers to avoid selling their product to cable's competitors.

As the Commission observed in its *Report and Order* applying its program access rules to open video systems, concentration of ownership among cable operators is significant in the program access context because it demonstrates an increase in the buying power of the major MSOs and because it facilitates the ability of MSOs to coordinate their conduct.[26] Indeed, the following excerpt from a trade press report about the TCI/Cablevision deal speaks volumes about the potential effect of cable industry consolidation on program access:

> [Cablevision chairman Charles] Dolan takes pains to describe the TCI deal as "stand-alone", with no side agreements for either MSO to push carriage of their programming services. *"But that doesn't mean that won't come later."*[27]

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exclusively on the wholesale level, or require programmers to sell networks individually at the wholesale level rather than packaging them together with other networks. Glick, "Tauzin Concerned About Cable Consolidation, Program Exclusivity," *Cable World*, at 1 (July 7, 1997).

[26] *Implementation of Section 302 of the Telecommunications Act of 1996 - Open Video Systems*, 11 FCC Rcd 18223, 18322 (1996).

[27] Paskowski, "Dolan's Mother of All Clusters," *Multichannel News*, at 56 (June 16, 1997) [emphasis added]. Recent events suggest that Mr. Dolan's remarks are less cryptic than they appear: Cablevision has already been found to have violated the FCC's program access on two separate occasions in its attempts to thwart competitors from obtaining SportsChannel New York. *See Bell Atlantic Video Services Company v. Rainbow Programming Holdings, Inc. and Cablevision Systems Corporation*, CSR-4983-P, DA 97-1452 (rel. Jul. 11, 1997); *CellularVision of New York, L.P.*, 10 FCC Rcd 9273 (CSB, 1995), *recon.denied*, 11 FCC Rcd 3001 (CSB, 1996).

Accordingly, increased consolidation within the cable industry raises a number of critical issues that directly affect a competitor's ability to offer the same programming services as incumbent cable operators. First, since cable programming services cannot succeed unless they are able to reach a critical mass of subscribers, they will be even more beholden to the large MSOs (and, correspondingly, under greater pressure not to sell to cable's competitors) as TCI and others tighten their stranglehold over distribution on a national and regional scale. On this point, it should be remembered that much of the newer cable programming product is owned by entities that are *not* vertically integrated and thus are not subject to the FCC's prohibitions on exclusive contracts, *e.g.*, Fox News/fX (News Corp.); MSNBC (Microsoft/NBC); TV Land (Viacom); and Eye on People (CBS). The increased horizontal concentration of the cable industry, under which a very small number of operators will control most if not all of the largest markets in the United States, in effect means that these non-vertically integrated cable programming services now have unprecedented incentive to maintain exclusive distribution arrangements with the large MSOs.

The recent experience of BellSouth and others in the wireless cable industry further demonstrates the point. For example, in New Orleans TV Land has signed affiliation contracts with incumbent wired cable operators but refuses to do so with wireless providers. Ironically, Viacom has been making a concerted effort to sell TV Land to as many cable operators as possible but will not allow BellSouth to participate. In addition, because Fox News/fX and

MSNBC are "cable exclusive," BellSouth and other wireless cable operators have been unable to obtain those programming services as well.[28]

BellSouth fully expects that this problem will become considerably worse in the wake of the recently announced joint ventures between non-vertically integrated programmers (*e.g.*, Fox and Microsoft) and highly vertically integrated cable operators such as TCI, Time Warner, Cablevision and Comcast. For instance, if Fox is unwilling to sell to cable's competitors now, it is difficult to believe that it will change its position now that it has become intimately aligned with the large MSOs through its participation in PrimeStar. Similarly, MSNBC's reluctance to sell to wireless cable is likely to continue for the indefinite future now that Microsoft has made a $1 billion investment in Comcast, currently the fourth largest MSO in the United States.

BellSouth has also discovered that the unwillingness of programmers to sell to cable's competitors even extends to local broadcast stations. In New Orleans, the incumbent cable operator, Cox Communications, rebroadcasts station WWL's newscasts on channel 15. When BellSouth contacted WWL to negotiate a similar arrangement for BellSouth's New Orleans wireless cable system, it was advised that if it wanted to retransmit WWL's news product, it

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[28] In addition, there already is some evidence that the new Fox/TCI/Cablevision national cable sports programming service will give TCI's cable systems additional leverage over ESPN, thereby providing an additional means for encouraging ESPN and other sports services to engage in discriminatory conduct towards alternative MVPDs as a means of currying favor with TCI. *See*, Umstead, "Fox Builds Sports Empire," *Multichannel News*, at 1, 54 (June 23, 1997) ["[T]he deal would give TCI leverage in future contract dealings with ESPN. Although the two companies reached a 10-year carriage agreement last April, the rates would be adjusted downward if ESPN loses any major professional sports rights, such as those for the National Football League."].

would have to hire and pay for new anchors to be used solely in connection with BellSouth's retransmission of WWL's newscasts.

In addition, a broadcaster may achieve *de facto* exclusivity with the cable industry by insisting that cable's competitors devote additional channels to the broadcaster's other programming services. This, for example, is how NBC was able to secure cable carriage for MSNBC in the New York City market, and how Fox secured carriage for fX in a number of major markets. Given that Fox and Microsoft have now become direct partners with the large MSOs, BellSouth is concerned that Fox and NBC have unprecedented incentive to cripple competition to cable by withholding retransmission consent for their broadcast properties if wireless cable operators and others do not carry additional programming services on terms and conditions dictated by Fox and NBC. In view of the difficulties wireless cable operators already have in attempting to obtain the Fox services and MSNBC, the possibility that programmers may act in this manner is by no means speculative.

Finally, in its last annual report to Congress on MVPD competition, the FCC stated the following:

> [It is argued that] as fiber-optic wiring becomes cheaper and easier to deploy and use, delivery of programming by terrestrial means instead of via satellite may permit cable operators to abuse vertical relationships between themselves and programmers. This fear is raised particularly with regard to local sports networks. . .
>
> [I]t appears that it may become possible for a vertically-integrated programmer to switch from satellite delivery to terrestrial delivery for the purpose of evading the Commission's rules concerning

> access to programming. If a trend of such conduct were to occur, we would have to consider an appropriate response to ensure continued access to programming.[29]

Since the date on which the FCC issued this statement, it has become clear that the "fiber evasion" is becoming a reality: it has been widely reported that Cablevision Systems Corp., which controls the rights to virtually all major sports programming in the New York City metropolitan area and is "the uncontested powerhouse of television sports," will soon launch a fiber-based version of its popular SportsChannel New York service with the express purpose of avoiding its program access obligations to competing DBS and wireless cable operators. The New York Times recently reported that:

> Even now, Cablevision is moving to circumvent a Federal requirement to share sports programming delivered by satellite with rivals in New York City. The law does not apply to programming services delivered by cable land lines, so the company is busily laying fiber-optic cables so it can switch its method of transmission.[30]

BellSouth submits that this is yet another instance in which marketplace developments have outpaced the original scope of the program access rules, which in their original form did not contemplate that programmers would eventually have the capability of delivering their services via fiber rather than through satellite transmission.

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[29] *Third Annual Report* at ¶¶ 153-154.

[30] Fabrikant, "As Wall Street Groans, A Cable Dynasty Grows," *N.Y. Times*, Financial P. 1 (April 27, 1997); *see also,* Umstead and Thomas, "Cablevision Reaches for Sports Exclusivity," *Multichannel News*, at 1 (Feb. 10, 1997).

BellSouth has already advised Congress directly of its efforts to create MVPD competition and need for Congress to amend the program access provisions of the 1992 Cable Act to close the loopholes described above.[31] In that vein, BellSouth urges the Commission to pursue a similar course and commence a rulemaking proceeding to either amend its rules or, where necessary, make recommendations to Congress which at a minimum (1) extend the program access rules to all programmers and broadcast television stations, regardless of whether they are vertically integrated or whether they are satellite-delivered, and (2) prohibit cable programming vendors and local television broadcast stations from requiring video distributors to carry any other programming channel as a condition of granting retransmission consent. One possible vehicle for such a proceeding is the recent Petition for Rulemaking filed by Ameritech New Media, Inc. (RM-9097), in which Ameritech asks the Commission to amend certain of its procedural program access rules and adopt a damages remedy for program access complainants.[32]

[31] *See,* Exhibit 1 hereto, Letter from David J. Markey to Senator John McCain (April 18, 1997).

[32] The Wireless Cable Association International, Inc. And DIRECTV have already asked the Commission to expand the scope of that proceeding to include consideration of the issues discussed above. *See,* Reply Comments of The Wireless Cable Association International, Inc., RM-9097, at 3-4 (filed July 17, 1997); Comments of DIRECTV, Inc., RM-9097, at 3-4 (filed July 2, 1997).

2. *The FCC Should Grant BellSouth's Petition for Reconsideration of the FCC's Antenna Preemption Rules.*

Congress has recognized that local restrictions on the use of outdoor antennas can hinder competition to cable, and thus adopted Section 207 of the Telecommunications Act of 1996, which directed the Commission to "promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services . . .," including wireless cable. In its *Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking* released August 6, 1996 (the "*Report and Order*"),[33/] the FCC issued its antenna preemption rules as required by the statute (47 C.F.R. § 1.4000).

As set forth in BellSouth's Petition for Reconsideration with respect to the *Report and Order*, BellSouth believes that while the overall structure of Section 1.4000 is appropriate, both the rule itself and the *Report and Order* as presently crafted still give local governmental authorities and homeowners associations too many opportunities to block competition via antenna restrictions directed solely at wireless cable operators and MVPDs which utilize wireless technologies. For instance, there is no basis for the FCC to "infer" for itself the authority to allow *any* restrictions that impair video reception (*e.g.*, those allegedly designed to promote safety or historical preservation interests), and the FCC thus exceeded its legal authority under Section 207 in doing so. Further, even if such restrictions were permitted, the FCC has inappropriately designed those restrictions in reliance on portions of the BOCA National Building Code which

[33/] IB Docket No. 95-59 and CS Docket No. 96-83, FCC 96-238 (rel. Aug. 6, 1996).

do not meet Section 1.4000's requirement that such restrictions be no more burdensome than necessary. BellSouth also believes that the FCC has not gone far enough to preempt permit or other "advance approval" requirements which unduly delay the introduction of competitive multichannel service, nor has it provided homeowners' associations, condominium associations or other non-governmental with any real disincentive to adopt blatantly illegal antenna restrictions that have no legitimate public safety objective.

The recent attempts by a local homeowners association ("HOA") to frustrate the efforts of the wireless cable operator serving San Antonio, Texas demonstrate why stronger antenna preemption rules are needed immediately.[34] In that case, notwithstanding the fact that its outright ban on outdoor antennas is in clear violation of federal law, the HOA sent notices of violation to a number of homeowners, at least one of whom decided to discontinue wireless cable service rather than confront the HOA. Similar examples of unlawful behavior have been identified in a number of other antenna preemption cases filed with the Commission over the past year.

Simply stated, it is a tremendous disservice to wireless cable operators and their subscribers to allow homeowners associations or any other local entity to impose obviously illegal antenna restrictions for an indefinite period of time while the Commission sorts through the petitions for declaratory ruling that inevitably arise therefrom. While these entities improvise explanations for their unauthorized conduct, wireless cable systems are put at substantial risk of losing subscribers to incumbent cable operators who are ready and willing to provide service.

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[34] *CS Wireless d/b/a OmniVision of San Antonio*, CSR-4947-O.

BellSouth thus urges the FCC to adopt the recommendations set forth in BellSouth's Petition for Reconsideration and thereby send a clear message to local governments and homeowners associations that any attempts to ignore the FCC's antenna preemption rules will not be tolerated.

3. The FCC Should Resolve Its Cable Inside Wiring Docket As Soon As Possible.

In virtually every market where BellSouth will launch competitive wired or wireless cable service, BellSouth must enjoy fair and equitable access to MDU properties in order to compete successfully with the incumbent cable operator. Competing MVPDs encounter obstacles in serving residents of MDUs - - obstacles that derive variously from legitimate concerns of property owners, anticompetitive cable operator conduct and/or discriminatory cable mandatory access laws that effectively obstruct competitors from obtaining access to MDUs. Accordingly, BellSouth requests that the Commission expedite its final decision in its cable inside wiring docket (CS Docket No. 95-184) and thereby provide all MVPDs with some certainty as to what the "rules of the road" in the MDU arena will be going forward.

III. CONCLUSION.

In his recent testimony before Congress on the subject of competition in the MVPD marketplace, Rupert Murdoch stated that Fox "will not withhold . . . programming from unaffiliated MVPDs."[35/] Now that Fox and other cable programmers have struck close alliances

[35/] *Testimony of Rupert Murdoch, Chairman and CEO, News Corp., before the Senate Commerce, Science and Transportation Committee re: Cable Competition* (April 10, 1997).

with the cable industry, the Commission must act to ensure that Mr. Murdoch's pro-competitive posture become rule rather than the exception. Clearly, since it appears that Mr. Murdoch's ambitious plan to deliver local signals via DBS has been shelved for the time being, cable overbuilders and wireless cable operators represent the *only* near-term possibility of genuine competition to incumbent cable operators. Yet , as demonstrated above, recent marketplace developments suggest that the FCC's rules may not be adequate to minimize the cable industry's anticompetitive practices, and that a reassessment of the FCC's regulatory framework for MVPDs should be strongly considered at this time. The FCC is not required to defer consideration of these issues until competition is delayed or eliminated by widespread abuses by the cable industry. Indeed, given the pro-competitive policies that are at the heart of the 1992 Cable Act and the Telecommunications Act of 1996, such a posture would most certainly be contrary to the public interest. The FCC is well within its authority to take a proactive stance in this matter and consider rule changes based on predictive judgments about marketplace developments. For the reasons set forth above, BellSouth submits that now is the time for the FCC to take such action in accordance with the recommendations set forth above.

Respectfully submitted,

BELLSOUTH CORPORATION
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BELLSOUTH WIRELESS CABLE, INC.

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July 23, 1997

EXHIBIT 1

BELLSOUTH

David J. Markey
Vice President-
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April 18, 1997

The Honorable John McCain
Chairman
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and Transportation
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Washington, D.C. 20510-6125

Dear Mr. Chairman:

The purpose of this letter is to respond to certain allegations made at last week's hearing regarding the willingness of local telephone companies (LECs) to participate in the multichannel video marketplace.

Testimony delivered at the hearing, as well as comments made in response to questions, were designed to leave the impression that LECs have reneged on promises to enter the cable market and increase choice for video consumers. Specifically, Gene Kimmelman, Co-Director, Consumers Union, asserted that telephone companies have abandoned plans to enter the cable market because they would rather enter the long distance market where they can make "fast money." Speaking only for BellSouth, I object to this characterization because it bears no relation to fact. In my opinion, it was conveyed to the Committee to discredit and delay LEC efforts to expand into new markets.

Since the February 8, 1996 enactment of the new telecommunications law, BellSouth has acquired seventeen cable television franchises in Georgia, South Carolina, Florida, Alabama and Tennessee. In addition, franchise applications are pending in seven other jurisdictions in Georgia and Florida. Based solely on the completion of this initial wave of franchising efforts, BellSouth will begin deploying wired cable facilities, where economically viable, in addition to our telephony services. These efforts over time could serve over a million cable households.